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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

DONISHA ALLEN,

Defendant and
Appellant.

A158267

(Alameda County
Super. Ct. No. 171681A)

Appellant Donisha Allen pled guilty to attempted murder in 2014 and was sentenced to a stipulated prison term of ten years. (Pen. Code, §§ 187, subd. (a)/664.)¹ While she was serving this term, the Legislature enacted Senate Bill 1437 (Stats. 2018, ch. 1015), which made certain changes to murder liability for aiders and abettors and provided a procedure under section 1170.95 for obtaining recall and resentencing for “[a] person convicted of felony murder or murder under a natural and probable consequences theory.” Appellant filed a petition pursuant to newly-enacted section 1170.95, but the trial court

¹ Further statutory references are to the Penal Code.

summarily denied relief on the ground that appellant was ineligible because she was convicted of attempted murder rather than murder. We affirm.

I. BACKGROUND

On August 25, 2012, appellant fought with her neighbor Demetria Spears over some bad marijuana. Later that evening, while in a group helping a friend to move out of her apartment, the two women fought again. Appellant's husband Larry Alford became involved in the altercation and was beaten by some male friends of Spears. He went back to his apartment and returned with a rifle or shotgun, which he then fired three times. He killed Spears and blinded a man named Dubose in the left eye. Before the shots were fired, appellant either said, " 'Let it go!' " or " 'Light it off,' " or " 'Let the motherfucker go.' " When interviewed later by the police, appellant admitted saying something like " 'get em' " or " 'fuck 'em up,' " but she didn't mean for her husband to kill anyone.

Appellant was charged with one count of murder and one count of attempted murder, along with allegations she was vicariously armed with a firearm. (§§ 187, subd. (a), 187, subd. (a)/664, 12022, subd. (a)(1).) In 2014, she pled guilty to one count of attempted murder, admitted an arming allegation and received a sentence of ten years. Alford pled guilty to second degree murder and attempted murder and received a sentence of 24 years in prison.

In 2019, appellant filed a pro. per. petition asking to be resentenced under section 1170.95. Counsel was appointed and

the matter was set for a hearing along with several other petitions by defendants who had been convicted of a crime other than murder. The court summarily denied each petition, finding no prima facie case had been made because section 1170.95 allowed relief to be granted only to a defendant convicted of murder.²

II. DISCUSSION

Appellant contends the trial court erred in denying her petition under section 1170.95 without a hearing on the merits. She argues the petitioning procedure under section 1170.95 applies to convictions of attempted murder, at least when the defendant was initially charged with murder, and that equal protection principles require that we extend section 1170.95 to attempted murder convictions. We disagree.

Effective January 1, 2019, the Legislature enacted Senate Bill No. 1437 for the express purpose of “amend[ing] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) “Reform [was] needed

² The rulings on the petitions filed in those other cases are pending in separate appeals before various divisions of this Court. (*People v. Camacho*, A158268 (Division 1); *People v. Cortez*, A158264 (Division 3); *People v. Housley*, A158286 (Division 5); *People v. Martinez*, A158265 (Division 3); *People v. Phan*, A158287 (Division 1).)

in California to limit convictions and subsequent sentencing so that the law of California fairly addresse[d] the culpability of the individual and assist[ed] in the reduction of prison overcrowding, which partially result[ed] from lengthy sentences that [were] not commensurate with the culpability of the individual.” (*Id.*, subd. (e).)

To effectuate these goals, Senate Bill 1437 amended section 188 to provide, “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (Stats. 2018, ch. 1015, § 2, subd (a)(3).) It amended section 189, subdivision (e) to provide that a defendant could be convicted of first degree murder under a statutory felony murder theory “only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

Senate Bill 1437 also added section 1170.95, subdivision (a) of which provides, “A *person convicted of felony murder or murder under the natural and probable consequences theory* may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on

any remaining counts when all of the following conditions apply:

[¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” (Italics added.)

Appellant’s liability for the crimes with which she was charged appears to be exclusively based on aiding and abetting under the natural and probable consequences doctrine. She argues she meets the criteria of section 1170.95, subdivision (a)(1)-(3) and is therefore entitled to be resentenced under section 1170.95.

A number of cases have held that the petitioning procedure of section 1170.95 applies only to convictions of first- or second-degree murder and does not apply to convictions of attempted murder or voluntary manslaughter. (See *People v. Turner* (2020) 45 Cal.App.5th 428, pp. 3-6; *People v. Cervantes* (2020) 44 Cal.App.5th 884, 886-887, review filed Jan. 31 and Mar. 30, 2020 (*Cervantes*); *People v. Flores* (2020) 44 Cal.App.5th 985; *People v. Larios* (2019) 42 Cal.App.5th 956, 970, review granted Feb. 26, 2020 (S259983); *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1017, review granted Mar. 11, 2020; *People v. Munoz* (2019) 39

Cal.App.5th 738, 751, 753756, review granted Nov. 26, 2019 (S258234) (*Munoz*); *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104-1107, review granted Nov. 13, 2019 (S258175) (*Lopez*).) The issue is pending before the Supreme Court in *Lopez*, which will ultimately decide the issue, and in the meantime we have been directed to no case in which the court has extended section 1170.95 to defendants convicted of crimes other than murder. We find the authorities cited above to be persuasive on this point and we likewise hold that in light of its plain language and the statutory intent, section 1170.95 did not apply to appellant. (See *Munoz* at pp. 755-760.)

Appellant urges a contrary result based upon the language of section 1170.95, subdivision (a)(2). That subdivision requires a demonstration that “[t]he petitioner was convicted of first degree or second degree murder following a trial *or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.*” (Italics added.) Appellant argues that because she “accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder,” she met the criteria of section 1170.95, subdivision (a). This ignores that the statute explicitly states that a “person convicted of felony murder or murder under the natural and probable consequences theory” may file a petition. “The plain language of the statute is explicit; its scope is limited to murder convictions.” (*Cervantes, supra*, 44 Cal.App.5th at p. 887.)

Appellant argues it would violate the equal protection clauses of the state and federal constitutions to limit section 1170.95 to those convicted of murder because persons convicted of attempted murder are similarly situated with respect to the legitimate purpose of the law. (U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7, subd. (a).) We reject this claim for the reasons stated in *Lopez, supra*, 38 Cal.App.5th at pages 1109-1110. “Murder and attempted murder are separate crimes. [Citations.] And murder is punished more severely than attempted murder. (Compare § 190, subd. (a) [penalty for first and second degree murder] with § 664 [penalty for attempted murder and attempted willful, deliberate and premeditated murder].) These different penal consequences necessarily mean, for purposes of sentencing reform, an individual charged with, or convicted of, murder under the natural and probable consequences doctrine is not similarly situated to an individual confronting a charge of attempted murder (or, possibly, only aggravated assault) under the doctrine. [Citation.] The Legislature is permitted to treat these two groups of criminals differently.” (See also *Cervantes, supra*, 44 Cal.App.5th at pp. 888-889; *Munoz, supra*, 39 CalApp.5th at p. 763.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A158267)